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REMARKS

Claims 1-15 are pending. By this Amendment, claims 1, 3, 7, 8, 10, and 13 are amended.

Claims 1 and 10 are amended to recite "an insertion end" for each horizontal and vertical support member and claim 13 is amended to recite "insertions ends" for the horizontal and vertical support members. Claims 1 and 10 are further amended to recite "the joint members accommodating the insertions ends of the vertical support members and horizontal support members therewithin." Claim 13 is amended to recite "joint members accommodating insertion ends of the horizontal support members and vertical support members therewithin." These amendments have support, e.g., in the specification at the paragraph beginning at page 4, line 3. Claim 1 is still further amended to recite "horizontal support member" rather than "horizontal cross member" to provide antecedence to the latter limitation as subsequently recited. Claims 7 and 8 are amended to recite "horizontal support members," in lieu of "horizontal cross members" to refer to "horizontal support members" recited in claim 1.

Claim 3 is amended to recite "at least one of the horizontal support members has a nonterminal aperture." Support for the foregoing amendment to claim 3 can be found, e.g., in the paragraph beginning at page 5, line 4 and Figure 1.

None of the foregoing amendments has added new matter and reconsideration and withdrawal of all objections and rejections is solicited.

Claim Objections

The Office Action objected to claim 9, stating "support to structure to be" should be amended to read "support structure to be." Claim 9 has been amended to correct the obvious typographical error and withdrawal of the objection is respectfully requested.

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35 U.S.C. §§ 102 and 103

Claims 1-6, 8-11, 13, and 15 are rejected under 35 U.S.C. § 102(b) as anticipated by U.S. Patent 5,577,465 ("Cook"). Applicant respectfully traverses this rejection. However, in order to advance the prosecution of this Application, claims 1, 10, and 13 have been amended as described above to recite that insertion ends of the horizontal and vertical support members are accommodated within the joint members. Additionally, claims 3 and 10 have been amended to recite "a nonterminal aperture" formed in at least one of the horizontal support members. Cook neither discloses nor suggests any of these limitations. Therefore, independent claims 1, 10, and 13 are submitted as not being anticipated by (nor obvious over) Cook. The other rejected claims depend directly or indirectly from one of the independent claims. Therefore, none of the rejected claims are anticipated by (or obvious over) Cook and withdrawal of this rejection is respectfully requested.

Claim 7 is rejected under 35 U.S.C. § 103(a) as obvious over Cook, the rejection stating "it would have been obvious ... to modify the teachings ... since the modification is merely [an] engineering design choice involving the selection of [an] old and notoriously well-known alternative fastening means performing the same intended function selected merely to [meet] certain ergonomic needs of the end user." Applicant respectfully traverses this rejection. If "such modification" is "old and notoriously well-known" it would seem to be rather straightforward to produce a document disclosing same. Moreover, the conclusory opinion of the Examiner is not sufficient to establish a prima facie case of obviousness, because the required motivation must also be established, inter alia from Cook, which is not the case in the instant Office Action as well.^{1,2} Moreover, the assertion of a "mere engineering design choice"

¹ See, In re Lee, 61 U.S.P.Q.2d 1430, 1434 (Fed Cir. 2002) ("The examiner's conclusory statements that the demonstration mode is just a programmable feature which can be used in many different device[s] for providing automatic introduction by adding the proper programming software and that another motivation would be that the automatic demonstration mode is user

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fails to establish a prima facie case of obviousness because the required motivation to do so has not been established.³ In addition to failing to establish a proper motivation for the proposed modification, the limitations described above with respect to amended independent claim 1 are neither disclosed nor suggested by Cook.⁴ If the rejection is maintained and the proper motivation has not been found in Cook (or any other document), the Examiner is respectfully required to execute a declaration or affidavit as to the proper motivation present in the art at the

friendly and its functions as a tutorial do not adequately address the issue of motivation to combine. This factual question of motivation is material to patentability, and could not be resolved on subjective belief and unknown authority. It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to [use] that which the inventor taught against its teacher. W.L. Gore v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983). Thus the Board must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the agency's conclusion." (internal quotation marks omitted) (emphasis added).

² See, M.P.E.P. § 2142 ("To establish a prima facie case of obviousness, ... there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. ... The teaching or suggestion to make the claimed combination ... must ... be found in the prior art, and not based on applicant's disclosure. In re Vaack, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).").

³ See, M.P.E.P. § 2144.05(VI)(C). In re Japikse, 181 F.2d 1019, 86 USPQ 70 (CCPA 1950) (Claims to a hydraulic power press which read on the prior art except with regard to the position of the starting switch were held unpatentable because shifting the position of the starting switch would not have modified the operation of the device.); In re Kuhle, 526 F.2d 553, 188 USPQ 7 (CCPA 1975) (the particular placement of a contact in a conductivity measuring device was held to be an obvious matter of design choice). However, "The mere fact that a worker in the art could rearrange the parts of the reference device to meet the terms of the claims on appeal is not by itself sufficient to support a finding of obviousness. The prior art must provide a motivation or reason for the worker in the art, without the benefit of appellant's specification, to make the necessary changes in the reference device." Ex parte Chicago Rawhide Mfg. Co., 223 USPQ 351, 353 (Bd. Pat. App. & Inter. 1984) (emphasis added).

⁴ See, M.P.E.P. 2143 ("To establish a prima facie case of obviousness, the prior art reference (or references when combined) must teach or suggest all the claim limitations.")

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time of the invention, which Applicant reserves the right to contradict or explain.⁵ Because a proper motivation has not been established and because Cook fails to disclose or suggest all the limitations of the pending independent claim 1, claim 7 is not obvious a fortiori. In view of the fact that claim 7 is not obvious over Cook, withdrawal of the rejection is respectfully requested.

Claims 12 and 14 are rejected under 35 U.S.C. § 103(a) as obvious over Cook, in view of U.S. Patent 5,709,164 ("Batterton"). Applicant respectfully traverses this rejection. Applicant first notes that neither Cook nor Batterton discloses or suggests "at least one ... horizontal support member defining a nonterminal aperture" or "joint members accommodating the insertions ends of the horizontal and vertical support members therein." Therefore, not all the limitations of independent claims 10 and 13 are disclosed or suggested by Cook and Batterton. Claims 12 and 14 depend from independent claims 10 and 13, respectively. Therefore, not all the limitations of claims 12 and 14 are disclosed or suggested as well. Moreover, Applicant respectfully traverses that the motivation to modify Cook with Batterton is present in the Batterton abstract as asserted in the Office Action. Specifically, encouraging a cat to scratch the play surface in order to discourage scratching on human furniture is not mentioned. Therefore, the required motivation is not present to combine the teachings of Cook and Batterton and a prima facie case of motivation is not been established a fortiori. Because all of the elements of claims 12 and 14 are not disclosed by Cook and Batterton and because the required motivation

⁵ See, M.P.E.P. § 2144.03 ("As the court held in Zurko, an assessment of basic knowledge and common sense that is not based on any evidence in the record lacks substantial evidence support. In re Zurko, 59 USPQ2d 1693, 1697.... If the examiner is relying on personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding. See 37 CFR 1.104(d)(2) [When a rejection in an application is based on facts within the personal knowledge of an employee of the Office, the data shall be as specific as possible, and the reference must be supported, when called for by the applicant, by the affidavit of such employee, and such affidavit shall be subject to contradiction or explanation by the affidavits of the applicant and other persons'].") (emphasis added).

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has not been established, a prima facie case of obviousness has not been established and withdrawal of the rejection is respectfully requested.

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration and prompt allowance of the application are respectfully requested.

The Examiner is invited to telephone the undersigned if the Examiner believes it would be useful to advance prosecution.

Respectfully submitted,



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